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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	
German, BERMUDEZ-COTA	File #(b)(6) [redacted]
Respondent	NON-DETAINED

RESPONDENT'S MOTION TO TERMINATE PROCEEDINGS

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	)	
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RESPONDENT'S MOTION TO TERMINATE PROCEEDINGS

Respondent, German Bermudez-Cota, through undersigned counsel, hereby moves to terminate proceedings pursuant to the U.S. Supreme Court's decision in *Pereira v. Sessions*, No. 17-495, 2018 WL 3058276 (U.S. June 21, 2018), which held that a putative notice to appear that does not contain the date and time of removal proceedings is not a "notice to appear under section 1229(a)" of the Immigration & Nationality Act (hereinafter "INA"). Because the notice to appear served on Mr. Bermudez-Cota does not contain the date or time of proceedings, it is not a notice to appear as explained in *Pereira*. Therefore, jurisdiction under 8 C.F.R. § 1003.14 never vested with the Immigration Court. The Board should exercise its *sua sponte* authority to terminate proceedings accordingly.

PROCEDURAL HISTORY

Mr. Bermudez-Cota was served with a Notice to Appear (hereinafter "NTA") on August 28, 2013 and charged with being removable under INA § 212(a)(6)(A)(i) for being present in the United States after entering the United States without inspection or parole. **(Exhibit A)**. This was the same NTA that was later filed with the Immigration Court to initiate proceedings against Mr. Bermudez-Cota. The NTA states:

> "YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at ***BLANK ADDRESS*** on ***a date to be set*** at ***a time to be set*** to show why you should not be removed from the United States based on the charge(s) set forth above."

At a hearing on October 3, 2017, Respondent, through undersigned counsel, admitted the allegations contained in the NTA and conceded removability. At that hearing, counsel requested a continuance to seek prosecutorial discretion and administrative closure. The Department of Homeland Security (hereinafter "DHS") declined to exercise prosecutorial discretion and the Immigration Judge denied administrative closure. In light of his motion to continue and request for administrative closure being denied, Mr. Bermudez-Cota accepted voluntary departure at the October 3, 2017 hearing. Mr. Bermudez-Cota timely filed the notice to appeal with the Board of Immigration Appeals. That appeal is currently pending. On June 21, 2018, the U.S. Supreme Court held in *Pereira v. Sessions*, No. 17-495, 2018 WL 3058276 (U.S. June 21, 2018) that a putative notice to appear, which does not contain the time and date of proceedings, is not a notice to appear under the plain language of the INA.

ARGUMENT

I. Because DHS Never Filed A Notice To Appear As Expressly Defined Under The Immigration & Nationality Act, Jurisdiction Never Vested With The Immigration Court

Mr. Bermudez-Cota's motion to terminate is based entirely on the Supreme Court's recent decision in *Pereira v. Sessions*. Like the notice to appear filed with the Immigration Court in the instant case, the notice to appear filed in *Pereira* "did not specify the date and time of Pereira's removal hearing," but instead, "ordered him to appear before an Immigration Judge in Boston 'on a date to be set at a time to be set." *Pereira v. Sessions*, No. 17-459, 2018 WL 3058276, at *6. The issue in front of the Court was whether the stop-time provisions under 8 U.S.C. §1229b(d)(1)(A) are triggered if the notice to appear served on the Respondent

does not contain the time and date of removal proceedings. The Supreme Court ruled that a "notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." *Id.* at *3. Simply stated, if a Notice to Appear is defective under Section 1229(a), then not only is it defective for purposes of the "stop-time" rule; but it is defective in it's entirety, and a defective NTA cannot vest the Immigration Judge with jurisdiction, in either a "stop-time" rule case, *or any other removal case where said NTA was defective*.

The Supreme Court's decision mandates that proceedings in this case be terminated because the Immigration Judge never had jurisdiction to grant Respondent voluntary departure in the first place. In reaching its decision in *Pereira*, the Court found it "need not resort to *Chevron* deference" because the "statutory text alone is enough to resolve this case." *Id.* at *7 and 8. Specifically, the Court pointed out that the plain text of the INA requires a NTA to contain "the time and place at which the [removal] proceedings will be held." 8 U.S.C. §1229(a)(G)(i). Thus, a "putative notice to appear that fails to designate a specific time and or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)'." *Id.* at *7.

Under the express terms of the regulations, "jurisdiction [only] vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. §1003.14. Because the NTA filed by DHS with the Immigration Court did not contain the time, date, or place of proceedings, it was not a "notice to appear under section 1229(a)" as explained in *Pereira*. Therefore, the Immigration Judge never had jurisdiction under 8 C.F.R. §1003.14 to grant voluntary departure. With proceedings never having been properly initiated with a notice to appear that comported with

the express and unambiguous terms of the INA, the grant of voluntary departure is *void ab initio* warranting termination of proceedings.

Mr. Bermudez-Cota is not seeking termination based on DHS's violation of a regulation or some other technicality. Rather, this motion is based on DHS never filing a notice to appear as expressly defined under the INA. As emphasized by the Supreme Court, "[c]onveying such time-and-place information to a noncitizen is an ***essential function of a notice to appear***, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Pereira*, 2018 WL 3058276, at *9 (emphasis added). Further, the Court found that the "omission of time-and-place information is not...***some trivial, ministerial defect***, akin to an unsigned notice of appeal." *Id.* at *10 (emphasis added). Rather, "[f]ailing to specify ***integral information*** like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its ***essential character***.'" *Id.* (emphasis added).

DHS lacks the statutory authority to delegate its "essential function" of filing a notice to appear that comports with the express terms of the INA in order to vest jurisdiction with the Immigration Court. As the language in *Pereira* demonstrates, DHS's failure to file a 'notice to appear under section 1229(a)' is not some 'trivial, ministerial defect.' It deprived the Immigration Judge from having the jurisdiction to grant Mr. Bermudez-Cota voluntary departure. Thus, Mr. Bermudez-Cota's proceedings should be terminated because his voluntary departure was not based on a 'notice to appear under section 1229(a)' of the INA.

II. The Board's Sua Sponte Authority to Terminate Is Warranted

This motion is predicated on the Supreme Court's decision in *Pereira v. Sessions*, which was issued on June 21, 2018. The Supreme Court's decision represents an exceptional

circumstance that invites termination as it constitutes a dispositive issue in this case: whether jurisdiction ever vested with the immigration judge to grant voluntary departure. The Board retains authority to decide this issue. *Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57, 59 (BIA 2009) ("An Immigration Judge has the authority to consider and decide whether he has jurisdiction over a matter presented to him."). Jurisdiction can never be waived or forfeited by a respondent. *See generally Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2016).

Pereira does not represent a change in the law. The Supreme Court's decision is predicated on the express terms of the INA that it found DHS has consistently and repeatedly disregarded in filing NTAs with the Immigration Court that are not 'notices to appear under section 1229(a)' of the INA. In other words, *Pereira* is not based on a new interpretation of an ambiguous statute. It is an emphatic rejection by an 8 to 1 margin of the way DHS has not filed noticed to appear that comport under the express terms of the INA. DHS has simply ignored what Congress wrote in the INA.

Indeed, DHS in *Pereira* conceded that "almost 100 percent" of "notices to appear omit the time and date of the proceedings over the last three years." *Pereira*, at *5. The Court thus determined that DHS was essentially 100 percent wrong by filing notices to appear with the Immigration Court that do not include an integral requirement under the plain terms of the INA. This is not some incremental view of the law. It represents a fundamental rejection in the way DHS has filed notices to appear that are not notices to appear under the INA.

The Court further stated that "[u]nable to find sure footing in the statutory text", DHS "pivot[s] away from the plain language and raise[s] a number of practical concerns." *Id.* at *12. The Court concluded "[t]hese practical considerations are meritless and do not justify departing from the statute's clear text." *Id.* In a similar vein, DHS should be foreclosed from

raising "practical considerations" over the fact that it filed a notice to appear in this case that is not a notice to appear as expressly defined under the INA. DHS's pattern and practice of not filing a notice to appear under the INA during the past several years is not material nor should it serve as a basis to deny Mr. Bermudez-Cota's motion to terminate. Jurisdiction never vested, thus the Board should exercise its authority to terminate proceedings.

CONCLUSION

The U.S. Supreme Court held in *Pereira v. Sessions*, No. 17-459, 2018 WL 3058276 (U.S. June 21, 2018) that a putative notice to appear, which does not contain the time and date of proceedings, is not a notice to appear under the plain terms of the Immigration & Nationality Act. For jurisdiction to vest with the Immigration Court, DHS was required to have filed a proper notice to appear. The notice to appear filed in this case does not contain the time and date of proceedings. Under a plain reading of *Pereira*, it was never a notice to appear, and thus jurisdiction never vested in the immigration judge to grant voluntary departure to Mr. Bermudez-Cota. For this fundamental reason, proceedings should be terminated.

Respectfully submitted this 2nd day of July 2018.

Selma Taljanovic, Esq.